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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 06 160 52701

Office: TEXAS SERVICE CENTER Date: JUL 27 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maura Deadrick
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer consulting company. It seeks to employ the beneficiary permanently in the United States as a configuration and design architect pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education required for classification sought. Specifically, the director determined that the beneficiary did not possess a foreign equivalent degree to a U.S. baccalaureate.

On appeal, the petitioner asserts that the beneficiary has the required education. The petitioner submits a new evaluation. The petitioner has not overcome the director's concerns with objective evidence that resolves the inconsistencies now in the record.

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the classification sought.¹

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary possesses a foreign three-year diploma in "Architectural Assistantship" from Andhra Polytechnic Kakinada and a certification from the Institute of Engineers (India) verifying that the petitioner passed Sections A and B of the Institution Examinations. Thus, the issues are whether that either credential is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider both credentials in combination.

As noted above, the ETA Form 9089 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

¹ Cf. *Hoosier Care, Inc. v. Chertoff*, No. 06-3562 (7th Cir. April 11, 2007) relating to a lesser classification than the one involved in this matter and relying on the regulation at 8 C.F.R. § 204.5(l)(4), a provision that does not relate to the classification sought.

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

(a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

(1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14) [current section 212(a)(5)].² *Id.* at 423. The necessary result of these two grants of authority is that

² As amended by Sec. 601, and as further amended by Sec. 172 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978; however, the changes made by Sec. 162(e)(1) were repealed by Sec. 302(e)(6) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-323, 105 Stat. 1733, effective as though that paragraph had not been enacted.

section 212(a)[(5)] determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)[(5)]. If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the Circuit Court of Appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). The Joint Explanatory Statement of the Committee of Conference provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (October 26, 1990). At the time of enactment in 1990, it had been almost thirteen years since *Matter of Shah*. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *Lujan-Armendariz v. INS*, 222 F.3d 728, 748 (9th Cir. 2000) *citing Lorillard v. Pons*, 434 U.S. 575, 580 (1978)(Congress is presumed to be aware of administrative and judicial interpretations).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for

the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 244. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Thus, in order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. As noted in the federal register, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree will qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience.

In response to the director's request for additional evidence, the petitioner submitted an evaluation from [REDACTED] an Independent Education Evaluator. [REDACTED] concludes that the beneficiary's Diploma in Architectural Assistantship was equivalent to "a specialized training course in the United States." [REDACTED] then concludes that the beneficiary's certificate from the Institute of Engineers is equivalent to three years of university-level credit in electronics and communications engineering from an accredited college or university in the United States. [REDACTED] also notes that the beneficiary completed a computer course but the primary evidence of that course is absent from the record. [REDACTED] concludes that "as a result of his educational background and employment experiences (3 years of employment experience = 1 year of university-level credit) [the beneficiary]

has the equivalent of an individual with a Bachelor's Degree in Electronics and Communication Engineering from an accredited college or university in the United States."

The director concluded that the beneficiary did not have a foreign degree that, by itself and not in combination with experience, was equivalent to a U.S. baccalaureate. On appeal, the petitioner asserts that the beneficiary's education alone is equivalent to a U.S. baccalaureate. The petitioner submits an evaluation from [REDACTED] of the Trustforte Corporation. [REDACTED] states that the "Institution of Engineers of India offers four-year programs of bachelor's-level study recognized by the Government of India and comparable to bachelor's programs at universities in India." [REDACTED] further states that the beneficiary completed four years of bachelor's level studies at this institution and that it is the practice of the Institution "to issue examination results at the end of each two-year period of study, rather than issuing transcripts specifying each of the completed courses." [REDACTED] asserts that the Ministry of Education and Social Welfare in India considers the completion of the Section A and B examinations of the Institute of Engineers of India to be equivalent to a four-year bachelor's level degree in Engineering from a recognized Indian university and sufficient for entry into master's level programs in Engineering. Thus, Mr. [REDACTED] concludes that the beneficiary "attained the equivalent of a four-year Bachelor of Science Degree in Electronic Engineering from an accredited US college or university."

The regulation at 8 C.F.R. § 204.5(k)(3)(i)(A) requires "an official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." This language reflects that the equivalent credential must be a degree, not a professional credential. While the petitioner submitted the beneficiary's examination results from the Institution of Engineers of India, it did not submit an official academic record for any course work at the institute. [REDACTED] asserts that such transcripts are unavailable. The regulation at 8 C.F.R. § 103.2(b)(2) provides that the absence of primary evidence creates a presumption of ineligibility unless the petitioner demonstrates that such evidence does not exist or is unavailable. The record lacks a statement from the Institution of Engineers confirming that they are a degree issuing institution that does not issue formal course transcripts.

Moreover, [REDACTED] evaluation is inconsistent with the original evaluation, which concluded that the beneficiary's education at the Institution of Engineers is only equivalent to three years of education towards a baccalaureate. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not submitted copies of the relevant pages of the reference materials on which [REDACTED] relies or confirmation from government officials in India. Without such evidence, the petitioner has not established that the second evaluation is any more credible than the first evaluation.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.